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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Federal-State Joint Board on ) CC Docket No. 96-45  
Universal Service )

To: The Commission

PETITION FOR RECONSIDERATION

Teletouch Licenses, Inc. (TLI), pursuant to Section 1.429 of the Commission's Rules, hereby requests reconsideration of the Commission's Report and Order ("the Order") in the above-captioned proceeding. TLI is concerned that the Commission's requirement that paging carriers fully contribute to fund universal service will have an inequitable and discriminatory impact on the paging industry, in general, and on TLI, in particular, in violation of Section 254(d) of the Communications Act of 1934, as amended (the Act), thereby resulting in a loss of service to the public. Accordingly, TLI urges the Commission to reconsider its decision and adopt safeguards for paging carriers to make contributions more reflective of the small benefit they derive from universal service.

In support thereof, the following is shown:

I. **Statement of Interest.**

TLI is a licensee in the Paging and Radiotelephone Service and the Business Radio Private Carrier Paging Service, with paging facilities located principally in Texas, Arkansas, Mississippi, Louisiana, Oklahoma, and Tennessee. TLI, like most one-way paging carriers, will be adversely affected by the

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Commission's requirement that it make mandatory contributions to the Universal Service Fund (USF) -- potentially bordering on six figures -- especially since the paging industry operates on small margins and is highly competitive. TLI is currently in the process of building out its systems in order to provide improved paging service to the public. The imposition of mandatory contributions to the USF, which TLI expects to be significantly large, could undermine its ability to improve its infrastructure and add additional paging sites, as necessary to respond to market forces and to meet customer demands. As a result, TLI and other similarly situated paging carriers could be forced to curtail services, or worse yet, be forced out of business.

**II. The Commission's Mechanism for Assessing Universal Service Fund Contributions is Inequitable as Applied to Paging Carriers, and is Therefore Contrary to the Act.**

**A. The Imposition of Mandatory Contributions by Paging Carriers to the Universal Service Fund is Tantamount to an Unlawful Tax.**

In its Order, the Commission erroneously held that the imposition of mandatory contributions to the USF by paging and other Commercial Mobile Radio Service (CMRS) carriers did not constitute an unlawful tax. See Order at paras. 598, 805. The basis for the Commission's conclusion was that the "primary purpose" of the USF collection mechanism was to "enhance access of schools and libraries to advanced telecommunications and information services, and not raise general revenues." Id. at para. 598. That the Commission is seeking to ensure discounted telecommunications services to schools and libraries is laudable.

However, the Commission cannot hide the mandatory USF contributions behind whatever label it chooses in order to avoid the actual purpose of the underlying legislation or regulation. Here, it is clear, under Section 254(d) of the Act, that "[e]very telecommunications carrier that provides interstate telecommunications services, shall contribute, on an equitable and non-discriminatory basis to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." (underlining added). While the Commission does not label the mandatory USF contributions as a tax, there is little or no distinction between a federally mandated contribution to the USF, which is to be a privately administered fund for the redistribution of monies to eligible entities, and the Federal government's imposition of an excise tax on telecommunications service, so that it can provide grants to local exchange telephone companies to subsidize welfare recipients' local telephone service. In both circumstances, the result is the same. Money is involuntarily collected from a certain class of people or entities pursuant to a Federal mandate, and is then redistributed to certain other beneficiaries. That the former may be administered by a non-governmental entity, pursuant to Federal mandate is insignificant, and makes it no less a tax than the Federal excise tax which is collected directly by the Federal government.

Since the collection of USF contributions is tantamount to the imposition of a tax, it represents an unconstitutional tax on

paging carriers, which, by definition, are ineligible to benefit from the USF.<sup>1</sup> In order to meet Constitutional scrutiny, the contributing paging carriers must receive a compensating benefit from their contributions. See Wisconsin v. J.C. Penny Co., 311 U.S. 435 (1940); Dane v. Johnson, 256 U.S. 589 (1921); and Morton Salt Co. v. City of South Hutchinson, 159 F. 2d 897 (10th Cir. 1947). In Dane, the Court stated that a tax which "results in . . . flagrant and palpable inequit[ies] between the burden imposed and the benefit received . . . amount[s] to the arbitrary taking of property without compensation," in violation of the Fourteenth Amendment's due process guaranty. Id. at 597. This is applicable here because paging carriers, as a class, would receive no discernable benefits from their contributions to the USF.<sup>2</sup>

As aptly pointed out by Celpage, Inc. in its Comments in the captioned proceeding, paging carriers will receive no benefits from their contributions to the USF. This is so because one-way

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<sup>1</sup> In particular, in order to be eligible to receive support from the USF, a carrier must be designated under Section 214(e) of the Act to receive support. Paging is not eligible for USF support since it is not a "core" or "designated" service, i.e., single-party service, voice-grade access to the public switched network, Dual Tone Multifrequency (DMTF) signaling, access to emergency services 9-1-1 and enhanced 9-1-1, access to operator services, access to interexchange services, access to directory assistance, and toll limitation services for qualifying low-income customers. See Order at para. 61.

<sup>2</sup> The Fourteenth Amendment does not require that a taxpayer receive a "sound bargain" or a "strict quid pro quo in services" for taxes that are paid to the Government. However, taxation is prohibited where no benefits whatsoever are received by the taxpayer, or where the benefits are nominal at best. See Myles Salt Co., 239 U.S. 478, 485 (1916).

paging carriers do not have the capability to "originate or transport" their calls, and instead, must rely on the public switched telephone network for these services. Thus, paging carriers pay local exchange carriers for these services, but they do not receive compensation for each paging call made to a paging receiver. As such, paging carriers cannot even indirectly benefit from the USF; and therefore, any collection of USF contributions from paging carriers violates the Fourteenth Amendment prohibition against taxation where the taxpayer receives no tangible benefits. Hence, neither the FCC nor Congress can compel paging carriers to make contributions to the USF.

**B. Requiring Paging Carriers to Make USF Contributions Based on End-User Revenues is Inequitable and Contrary to Section 254(d) of the Act.**

In its Order, the Commission declined to (a) exempt paging carriers from the requirement to make USF contributions, or (b) adjust the formula to ensure that any required USF payments are fair and equitable for paging carriers. Order at para. 805. This is contrary to Section 254(d) of the Act, which requires that contributions be made on an equitable basis. Under the USF program, all interstate telecommunications carriers, without regard to whether the particular carrier or class of carriers is eligible for USF support, will be required to make USF contributions that are based upon end-user revenues. See Rule Section 54.703(b) and (c). Assuming arguendo that collection of the USF contributions is not unconstitutional for the reasons

shown above, this mechanism will nonetheless have an inequitable impact on paging carriers, due to their unique circumstances, and thus, is contrary to law.

Like many established paging carriers, TLI has, over the years, expended millions of dollars to build its network, including transmitters, terminals, sales and service centers, etc. There are large recurring fixed-monthly expenses associated with maintaining and updating large wide-area paging systems. These expenses include not only hardware costs, but also costs for personnel that are necessary to ensure that subscribers receive the high quality service that they expect, especially in the event of a life-safety emergency.<sup>3</sup> Paging carriers must rely on their subscriber (end user) revenues to cover these expenses; and any diminution of end user revenues, as would occur under the Commission's current USF mechanism, could have an adverse effect on the continued provision of paging services.

Because the paging industry has become highly competitive, subscriber end-user revenues have dropped significantly and are relatively low, even though carriers' expenses have remained largely fixed. Requiring paging carriers to make USF contributions on the basis of end-user revenues will make it difficult for paging carriers in most major markets to retain

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<sup>3</sup> Like most paging carriers, TLI provides paging service to many hospitals, physicians, police departments and sheriffs' offices, as well as ambulance services and fire departments. Many of these agencies use commercial paging services as an adjunct to their internal radio dispatching in order to ensure that the proper personnel are notified of emergencies in a timely manner.

enough capital to improve their service offerings. And, because of fierce competition in the paging industry, carriers will not have the luxury of increasing subscriber charges to cover these contributions, but instead, will be forced to absorb the costs associated with the USF contribution.<sup>4</sup> As a result, any USF contribution requirements that are based upon end-user revenues will have a discriminatory adverse effect on the paging industry by potentially forcing carriers out of business and reducing competition. This result is inequitable and contrary to the public interest.

In order to resolve this inequity, assuming arguendo that collection of the USF contribution does not amount to an unconstitutional tax, TLI urges the Commission to establish a separate formula for paging carriers that is based on net-profits. This would ensure the continued viability of industries, such as paging, where competition is intense and profit margins are thin. Basing a paging carrier's USF contribution on a percentage of net profit, rather than end-user revenues, would eliminate this infirmity.

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<sup>4</sup> Because of high competition, it is not unusual for paging carriers to lose business accounts to competitors over rate differences of 50 cents or less per pager per month.

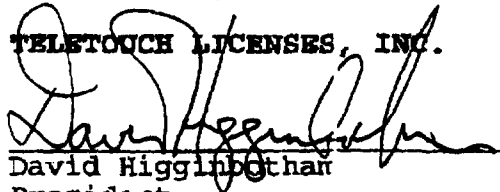
**Conclusion**

For the reasons described above, it is requested that the Commission reconsider its action.

Respectfully submitted,

**TELETOUCH LICENSES, INC.**

By

  
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